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No. 10-371

IN THE

Supreme Court of the United States

LAWNWOOD MEDICAL CENTER, INC.,

Petitioner,

v.

SAMUEL H. SADOW,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Florida Fourth District Court of Appeal applied this Court's guidepost analysis under the Fourteenth Amendment to an award of punitive damages for intentional harm.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the Florida Fourth District Court of Appeal did not utilize state law to exempt a punitive award from the guidepost analysis, but rather used state law as a factor in that analysis.

III. Whether Petitioner has presented compelling reasons to grant the Petition, where the Florida Fourth District Court of Appeal used the defendant's wealth to assess whether the state's interest in punishing and deterring egregious and willful defamation was served, without excessive punishment; where it relied on awards in similar cases as an indication that the defendant had fair notice that it could be liable for an award of the size at issue; and where the standard jury instructions used in Florida for this issue were submitted to the jury by agreement of all counsel.

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INTRODUCTION

Petitioner Lawnwood Medical Center, Inc. ("Petitioner" or "Lawnwood") has presented no compelling reasons for its Petition for a Writ of Certiorari ("Petition") to be granted. *See* Sup. Ct. R. 10. Specifically, Petitioner's arguments notwithstanding, the decision of the Fourth District Court of Appeal of Florida ("Fourth DCA"), one of five intermediate appellate courts in the state, neither conflicts with nor declines to follow decisions of this Court and other lower courts. In fact, although the District Court of Appeal certified a question relating to the punitive damages award to The Florida Supreme Court as having great public importance, the Florida Supreme Court denied review, without even allowing the submission of briefs. Lawnwood's request that the Florida Supreme Court take the case was denied in a two-sentence order. Pet. App. at 53a. The Florida Supreme Court would have reviewed the case only if it had found a conflict between District Courts of Appeal in Florida, or if it viewed the ruling as a matter of great public importance. Fla. R. App. P. 9.030.

In addition, the Florida District Court opinion at issue here was decided in conformance with this Court's decisions regarding punitive damages under the Fourteenth Amendment. The Petition repeatedly states that the Fourth DCA "expressly refused to apply the three guideposts" and "expressly declined to apply the five *State Farm* factors that define the reprehensibility guidepost. . . ." Pet. at 8. Nothing could be further from the truth. The court took careful consideration of this Court's precedents and applied this Court's directions

in a detailed 51-page opinion.[1] This opinion will be analyzed further below, but the court concluded at page 51 of its opinion:

> After giving the exacting appellate review of this case required under the de novo standard of *State Farm* and *BMW*, we conclude that the amount of punitive damages assessed conforms to applicable law and is neither excessive nor arbitrary so as to exceed federal Constitutional norms.

Pet. App. at 51a. The opinion, in sum, does not actually pose the questions set forth in the Petition; nor were all of the issues raised in the Petition properly preserved and raised below.

The Petition asserts that the Fourth DCA exempted punitive damages awarded for intentional harm from the three "guideposts" set forth by this Court in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). While the Fourth DCA concluded that the instant case was more similar to *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), it expressly applied the *BMW* guideposts. The Petition further asserts that the Fourth DCA ignored the reprehensibility factors enumerated in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003) and compared the size of the punitive award to Lawnwood's wealth rather than the plaintiff's harm. To the contrary, the court properly examined the proportionality between the punitive award and the *potential* damage resulting from

1. As formatted for an appendix to the Petition.

Lawnwood's conduct. It did not "redefine[] the 'proportionality' concern. . .to focus. . .on the relationship between the punitive award and the defendant's wealth." Pet. at 9. Rather, the Fourth DCA did analyze the impact of the award on Lawnwood, based on the intended functions of punitive damages, and wealth is properly a factor in that analysis. Moreover, Lawnwood did not object to the introduction of evidence at trial regarding its net worth, and did not present any evidence to controvert the assessment of that net worth. Finally, Lawnwood notably never appealed the appropriateness of a punitive damage award; rather, it made the sole argument on appeal that the amount of the award was excessive under the Fourteenth Amendment.

Pursuant to a *de novo* review, and in an opinion that relied heavily on this Court's opinions in *BMW*, *State Farm*, and *TXO*, the Fourth DCA held that a jury's award of $5 million in punitive damages against Lawnwood for its slander *per se* of Dr. Sadow did not violate Lawnwood's due process rights. The slander consisted of intentionally malicious statements by a top executive official at Lawnwood, its Chief Financial Officer ("CFO"), about a physician who was a member of its own medical staff, in the presence of other top executive officials, including its Chief Executive Officer ("CEO"). Lawnwood had more than fair notice of potential liability in this amount, based on awards in similar cases and the state's removal of statutory punitive damages caps for like conduct. Finally, the award is proportionate with the potential harm to Dr. Sadow, as well as the extreme reprehensibility of the conduct on which Lawnwood's liability was based. The Fourth DCA

emphasized Florida's strongly-expressed condemnation and disfavor of defamation, as a factor in its analysis. Contrary to Petitioner's assertions, the court neither ignored the punitive damage guideposts set forth by this Court in multiple opinions nor utilized state law to exempt this case from that guidepost analysis.

STATEMENT OF THE CASE

Contrary to the assertions in the Petition, this case is not one in which a jury simply awarded $0 in compensatory damages and $5 million in punitive damages. A jury found Lawnwood had breached a contract with Dr. Sadow, and awarded him $1,517,000 in compensatory damages for that breach. Pet. App. E. The jury award for breach of contract is not addressed by Petitioner in any substantive fashion. The jury also found, on a separate count for defamation, that Lawnwood had slandered Dr. Sadow, had "a specific intent to harm Dr. Sadow, and that the conduct of Lawnwood did, in fact, harm Dr. Sadow". Pet. App. at 64a, 68a. The jury then determined that a punitive damages award of $5 million was appropriate to punish Lawnwood for its willful and malicious defamation of Dr. Sadow, and Lawnwood seeks review of the amount of that award.

Dr. Sadow, who was a practicing surgeon with thoracic surgery privileges at Lawnwood, initially sued Lawnwood for breach of contract, as the result of Lawnwood's denial of his request for increased privileges. During the pendency of that action, he sought and received permission to amend his complaint to add a claim for defamation. As reflected in the Fourth

DCA opinion, the defamation claim arose because of a series of highly defamatory statements that a *top executive official* of Petitioner had made, during the pendency of the breach of contract claim, about Dr. Sadow's professional reputation, his ability as a surgeon, and his integrity. Pet. App. at 13a-16a. Thus, the Petitioner's reference to the defamation claim as "belatedly tacked on to the lawsuit" (Pet. at 4) is misleading and improper. The claim was added before the relevant statute of limitations expired. The Fourth DCA opinion simply does not raise the issue of the timing of the defamation claim, and certainly does not reflect that Petitioner appealed this issue.

The Fourth DCA opinion[2] exhaustively chronicles the events giving rise to the defamation claim. Pet. App. at 13a-17a. In summary, Lawnwood hired Dr. Pinon to staff Lawnwood's new walk-in clinic in Ft. Pierce. *Id.* at 13a. Among other comments, Lawnwood's CFO Mr. Dunwoody told Dr. Pinon, in the presence of Lawnwood's CEO, that Dr. Sadow was one of the "problem doctors" at Lawnwood, that Dr. Pinon should not send referrals to Dr. Sadow based on competency issues, and that Mr. Dunwoody "wouldn't send my dog for surgery to him." *Id.* at 13a-15a. The Fourth DCA opinion indicates that there was no retraction of any defamatory statements and that in its pleadings Lawnwood denied that any such statements had been made. *Id.* at 16a. Significantly, Lawnwood stipulated at trial that its denial of Dr. Sadow's request for increased privileges, which denial formed a part of the basis for Dr. Sadow's breach of contract claim, was not based on his competency or qualifications as a physician. *Id.* at 9a.

2. The full opinion is attached to the Petition as Appendix A.

The trial was bifurcated and tried before a single jury. Phase I, including both the breach of contract claim and the defamation claim, lasted approximately five weeks. In Phase I, the jury was asked to consider whether Lawnwood had defamed Dr. Sadow, and if it had, whether Dr. Sadow was entitled to compensatory, nominal, or punitive damages. Pet. App. D. During Phase I, evidence was introduced with regard to negative comments about other physicians made by Mr. Dunwoody, who was the CFO of Petitioner. Pet. App. at 14a, 16a, 30a. With regard to the defamation claim, the jury found in Phase I of the trial that Lawnwood had slandered Dr. Sadow and that punitive damages were warranted. Pet. App. E. The jury did what it was told in the agreed-upon jury instructions it could do: it awarded zero compensatory or nominal damages, but then indicated punitive damages were merited. Lawnwood did not appeal this portion of the verdict.[3]

After the jury decided in Phase I that punitive damages were warranted, evidence was presented to the jury in Phase II of the trial to assist the jury members in deciding on an appropriate amount of punitive damages. An expert witness for Dr. Sadow presented uncontroverted evidence of the net worth of

3. Although the jury instructions were not appealed, the Fourth DCA pointed out that a potentially erroneous jury instruction "may have resulted in the jury's failure to find even nominal compensatory damages for the slander per se." Pet. App. at 49a. The Fourth DCA stated that, if properly instructed, the jury would have had to award at least nominal damages, since in Florida general damages are *conclusively presumed* to result in cases of defamation per se." *Id.* at 50a (citations omitted).

Lawnwood being well in excess of $100,000,000 and the amount of punitive damages that it would take to financially disrupt Lawnwood. Pet. App. at 18a-19a. Finally, a witness for Lawnwood indicated that the administration had instituted a program to educate employees about defamation, but only *after* the jury's Phase I verdict, which had been returned only a few days previously. *Id.* at 19a.

The jury then determined, in a Phase II interrogatory regarding punitive damages for the slander, that Lawnwood had "a specific intent to harm Dr. Sadow" and that the conduct of Lawnwood did in fact harm Dr. Sadow. Pet. App. G. It imposed a verdict of $5 million in punitive damages against Lawnwood. During post-trial motion hearings, the trial judge noted that the jury could well have found, consistent with its answers on the verdict forms, that Lawnwood had set out to destroy Dr. Sadow. Pet. App. at 45a.

As reflected by the Fourth DCA opinion, Lawnwood appealed to the Fourth DCA based only on two narrow legal issues, only one of which is raised in its Petition here. Lawnwood appealed the award of $1,517,000 in compensatory damages for breach of contract on the basis of state law, but the Fourth DCA upheld the verdict and Lawnwood's petition here does not seek further review of this portion of the award.

The sole issue properly raised in the Petition is Lawnwood's assertion that the amount of the jury's $5 million assessment of punitive damages for slander *per se* of Dr. Sadow violated its due process rights under the Fourteenth Amendment to the U.S. Constitution and

therefore should be remitted. In its appeal to the Fourth DCA, Lawnwood did *not* raise or dispute the sufficiency of the evidence or the factual findings made by the jury. Again, Lawnwood appealed only the trial court's denial of its motion for remittitur, and acknowledged that the jury was entitled to impose punitive damages.

Utilizing this Court's guidance as set forth in multiple opinions, including those in *BMW*, *State Farm*, and *TXO*, the Fourth DCA thoroughly analyzed the appropriateness of the amount of the punitive damages awarded by the jury and determined that Lawnwood had not been denied due process thereby. Lawnwood mischaracterizes the Fourth DCA's analysis as raising certain questions that are appropriate for review by this Court. As discussed below, Lawnwood does not present accurate and compelling reasons to grant its Petition. Moreover, even under a *de novo* review, the result reached by the Fourth DCA was proper and should not be disturbed.

REASONS FOR DENYING THE PETITION

This punitive damages award does not merit review by this Court, and certainly does not merit the summary reversal requested by Petitioner. Petitioner essentially requests that this Court eviscerate the entire purpose behind punitive damages and ignore the legitimate state interests underlying such damages: namely, protecting citizens from malicious and intentional conduct of a type that can ruin lives, reputations and livelihoods.

In a line of cases including *BMW*, *State Farm*, and *TXO*, this Court has set out guideposts and factors to ensure defendants receive the benefit of due process when required to pay punitive damages. Due process under the Fourteenth Amendment prohibits arbitrary punitive damage awards. In deciding what constitutes an arbitrary award, this Court has required that defendants have fair notice of potential liability for their actions, and that punitive damages not be disproportionate to the actions on which they are based or to the ability of the defendant to pay. This Court has also stressed, in its line of cases on punitive damages, that a bright line cannot be drawn between a constitutional award and an unconstitutional award, and has emphasized the role of the state interests served by punitive damages, namely punishment and deterrence.

Lawnwood has requested that the $5 million punitive damages award against it be remitted to a mere $1,000. The Fourth DCA clearly concluded, in its extensively reasoned decision, that such a pittance would have absolutely no effect as a deterrent to or as a punishment, as against a corporation with an undisputed *net* worth of well over $100 million. As the Fourth DCA noted, even the $5 million award represents less than five percent of Lawnwood's net worth, "a small part – if a roll of quarters symbolized net worth, just two of its coins...." Pet. App. at 48a. Florida has enacted statutory caps on punitive damages, but removes those caps for instances, such as the one before this Court, in which "the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant." § 768.73(1), Fla. Stat. (2009). The

Petition appears to make an argument that this portion of the statute violates the Fourteenth Amendment, but if that is in fact what Petitioner is asserting, it did not ever raise the argument below.

In Florida, general damages are *conclusively presumed* to result in cases of defamation per se. Pet. App. at 36a (*citing Hartley & Parker v. Copeland*, 51 So.2d 789 (Fla.1951); *Commander v. Pedersen*, 116 Fla. 148, 156 So. 337 (1934); *Miami Herald Publishing Company v. Brown*, 66 So.2d 679, 680-81 (Fla.1953); and *Campbell v. Jacksonville Kennel Club*, 66 So.2d 495 (Fla.1953). Despite this presumption, and its specific finding that the defamatory conduct of Lawnwood did in fact harm Dr. Sadow (Pet. App. G), the jury appears to have used the punitive damages award to express its judgment, rather than apportioning such judgment between compensatory and punitive categories. This case, with its $0 nominal and compensatory award together with its $5 million punitive award, therefore appears to be unique and based on facts not likely to recur. Thus, review of this particular case by this Court is not necessary to provide guidance for Florida or other state courts in general. Moreover, the Fourth DCA opinion at issue does not contain the errors that Lawnwood claims in its Petition, as discussed below.

I. The Florida Fourth District Court of Appeal applied this Court's guidepost analysis under the Fourteenth Amendment to an award of punitive damages for intentional harm.

Contrary to Petitioner's assertions, the Fourth DCA did not ignore or refuse to apply the requirements laid out by this Court for reviewing punitive damage awards. Rather, it carefully considered this Court's opinions in *BMW*, *State Farm*, and *TXO*, and analyzed the award in accordance with those cases. It did distinguish the type of conduct at issue here with that at issue in *BMW* and *State Farm*, and noted that, under its reading of a series of decisions by this Court, and of specific language in *BMW* and *State Farm*, the "fixed ratio between punitive and compensatory damages was intended to apply primarily to the kind of 'wrongdoing' involved in [those two cases]." Pet. App. at 27a. The Fourth DCA quoted extensively from *BMW* and *State Farm* to support its analysis. It then looked to *TXO* for guidance as a case that involved intentionally malicious conduct, and that has not been retreated from or abrogated by this Court. Pet. App. at 27a-30a.

Lawnwood has focused in a narrow fashion on the three guideposts set forth in *BMW*. Lawnwood's narrow focus fails to address considerations that underlie a due process analysis of the amount of punitive damages, including punishment, deterrence, and *potential* harm, which this Court identified as a factor in the *BMW* "reprehensibility" guidepost but which Lawnwood entirely ignores. This Court has not indicated that the *BMW* guideposts are the exclusive factors to be considered in a due process analysis of punitive

damages, or that they must be narrowly applied to every imaginable case.

A factor of the deterrence analysis that this Court has recognized for due process purposes applies here; namely, whether the wrongful conduct produced a substantial or small amount of economic damages. *See State Farm*, 538 U.S. at 425. In some instances, if reckless conduct produces only a small or no amount of compensatory damages, a greater amount of punitive damages may be required to adequately send a message to the wrongdoer to refrain from engaging in that conduct again. As noted by the Fourth DCA, this Court stated in *BMW*:

> Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach.

Pet. App. at 26a, *quoting* 517 U.S. at 582.

Although the jury awarded Dr. Sadow compensatory damages only for his breach of contract claim, a "zero" verdict for compensatory damages on the defamation count does not excuse wrongdoing, particularly when the jury made a specific finding, despite the allocation

of its monetary awards, that the conduct of Lawnwood did in fact harm Dr. Sadow. Pet. App. at 68a. As noted *supra*, in Florida general damages are conclusively presumed as a result of slander per se. As the Fourth DCA discussed in its analyses of reprehensibility and proportionality, Dr. Sadow's potential damages from the slander were significant, and Lawnwood was properly on notice of that potential. Pet. App. at 45a and 48a, n. 37.

The Fourth DCA's opinion, like the jury's award, emphasizes the reprehensibility of Lawnwood's actions. See, e.g., Pet. App. at 33a-46a. The Fourth DCA characterized the defamation as "a purposeful act of malevolent destruction of the reputation of one of its surgeons, done repeatedly as a matter of policy." *Id.* at 45a. Moreover, the source of the defamation could be viewed as "powerfully authoritative." *Id.* at 45a, n. 31. Mr. Dunwoody, Lawnwood's CFO at the time, told Dr. Pinon that Dr. Sadow was one of the "problem doctors" at Lawnwood, that Dr. Pinon should not send referrals to Dr. Sadow based on competency issues, that Mr. Dunwoody "wouldn't send [his] dog for surgery to [Dr. Sadow]," and that if Dr. Pinon cared about his patients, he would not send those patients to Dr. Sadow for surgery. These statements were made in the presence of Lawnwood's CEO Mr. Pentz, without any demurral or objection by the latter. It is hard to imagine anything worse that could be said about a physician in the conduct of his profession.

Lawnwood's slander of Dr. Sadow was found by the

jury to be intentional, with a "specific intent" to harm him. This was not a case of a careless comment that was misconstrued by a listener. Instead, the evidence clearly showed that Lawnwood set out on a deliberate course to damage and even ruin Dr. Sadow. Lawnwood slandered him to a peer in the local medical community, a person whose opinion of Dr. Sadow could be expected to directly impact both Dr. Sadow's reputation in the community and his economic wellbeing through the potential loss of referrals. The Fourth DCA stated that a reasonable jury "could rationally have equated the slanders to feathers loosed into the wind, with no one ever knowing where they all landed or whom they touched. The effects could be seen as insidious and unknowable." Pet. App. at 45a.

Moreover, pursuant to a jury instruction proposed by Lawnwood itself, the jury members were instructed that if they found that Mr. Dunwoody was personally guilty of intentional misconduct regarding his slander of Dr. Sadow, then they could determine that punitive damages against Lawnwood were warranted. *Id.* at 60a.

II. The Florida Fourth District Court of Appeal did not utilize state law to exempt a punitive award from the guidepost analysis, but rather used state law as a factor in that analysis.

The Fourth DCA looked to this Court's opinions for authority to utilize state law as a factor in determining whether this punitive damages award satisfied Florida's strongly-expressed interest in punishing and deterring defamation. It quoted the following language from

BMW:

> In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence. Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.

Pet. App. at 26a-27a (internal citations omitted in opinion), *quoting BMW*, 517 U.S. at 569.

The Fourth DCA noted this Court's instruction to consider three guideposts when reviewing punitive damage awards: first, the degree of reprehensibility of the defendant's misconduct; second, the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and third, the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. Pet. App. at 33a, *citing State Farm*, 538 U.S. at 418; *BMW*, 517 U.S. at 575. It then analyzed and applied the state law of Florida to measure the reprehensibility of Lawnwood's misconduct. Pet. App. at 35a-41a. Petitioner's assertion that the Fourth DCA "relied on

state law to create an exception to the three-guidepost constitutional analysis mandated by this Court" (Pet. at 18) is therefore not well founded.

III. The Florida Fourth District Court of Appeal used the defendant's wealth to assess whether the state's interest in punishing and deterring egregious and willful defamation was served, without excessive punishment.

Expert testimony presented by Dr. Sadow at trial indicated that Lawnwood's net worth measured well over $100 million. Significantly, Lawnwood presented no expert testimony of its own on this issue. Nor has Lawnwood asserted an inability to pay or that payment of the jury's $5 million award would bankrupt or destroy the Hospital. The only expert who testified at Phase II of the trial indicated that a punitive damages award in the range of $30-38 million would not financially destroy the hospital. Pet. App. at 19a. The Fourth DCA opined, in accordance with the evidence presented at trial, that an amount of punitive damages less than what the jury awarded may not perform the function of deterring further wrongdoing by Lawnwood. Furthermore, such evidence indicates that the jury's award of punitive damages was not based on mere "caprice." *See State Farm*, 538 U.S. at 418 (capricious jury awards discussed as one of the Supreme Court's concerns with regard to punitive damages).

This Court has confirmed that the proper proportionality inquiry is " 'whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well

as the harm that actually has occurred.' " *BMW*, 517 U.S. at 581 (*quoting TXO*, 509 U.S. at 460 (emphasis in original)). Therefore, in determining whether the jury's punitive damages award violated Lawnwood's due process rights, it is proper to consider the *potential damages* of the defamation, as well as the actual damages awarded by a jury, and the pursuant compensatory damages in cases of slander per se, such as this one. *Id.* This analysis refers back to the underlying concern behind the due process limitations on punitive damages—namely, that a defendant should have fair notice of its potential liability for wrongdoing. As the Fourth DCA commented, Lawnwood had fair notice that the potential damages of defaming Dr. Sadow, a practicing physician, could lie in the millions of dollars. Pet. App. at 48a, n. 37.

Furthermore, evidence was presented at trial to show that Mr. Dunwoody made potentially defamatory comments about other physicians, in addition to Dr. Sadow. This Court has stated that evidence of harm to nonparties may be considered to show that the conduct that harmed the plaintiff in a case also poses a substantial risk of harm to the general public, and so is particularly reprehensible. *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007).

There can be no mistake about the intentional malice of Lawnwood's statements. The evidence at trial demonstrated those statements could have had only one meaning and one objective: namely, to so demean the reputation of a physician in good standing at the hospital that his practice would be destroyed. Thus this case exactly fits the category described by this Court when

it noted that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." *BMW*, 517 U.S. at 582-83.

CONCLUSION

Petitioner Lawnwood has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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REPLY BRIEF

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REPLY FOR PETITIONER

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Brief of Product Liability Advisory Council, Inc. as Amicus Curiae in Support of Petitioners, *Shell Oil Co. v. Hebble*, No. 10-349, 2010 WL 4641633 ..... 2, 5, 7, 10

REPLY FOR PETITIONER

Dr. Sadow's reply cannot escape these stark realities: the Florida court determined reprehensibility based on state law rather than this Court's multifactor analysis, abandoned the ratio of punitive to compensatory damages in favor of comparing the punitive award to Lawnwood's wealth, and ignored the penalty that Florida prescribed for comparable conduct. In these ways, the Florida court refused to follow both this Court's guideposts and its procedures for their exacting, *de novo* application to the punitive award.

Dr. Sadow condones these significant departures from this Court's holdings because the Court left open the possibility that higher ratios of punitive to compensatory damages may be justified when compensatory damages are not substantial. Opp. 12, 17-18. Yet he does not dispute that this situation arises frequently, lower courts are deeply split over how to address it, and this case is a superior vehicle for resolving this important split. Pet. 31-36. The Court's guideposts must also inform this situation, not free States to make up their own eclectic criteria, as Dr. Sadow advocates.

Dr. Sadow's abandonment of the guideposts only highlights the worst problems of the Florida court's *ad hoc* approach: using exceptions to state punitive caps to make a defendant's ability to pay the sole constitutional limit; discarding the objective guideposts based on an incomplete reprehensibility analysis; singling out speech for severe punishment; and second-guessing jury damage findings with unsupported speculation about potential harm. The amicus briefs in *Shell Oil Co. v. Hebble*, No. 10-349, confirm that many of these problems are important and re-

curring. Allowing such departures from the established guideposts can only yield arbitrary and unpredictable results, not the uniform treatment of similar cases that is this Court's goal.

I. THIS CASE IS AN IDEAL VEHICLE TO SETTLE THE DIVISIVE AND RECURRING QUESTION OF HOW DUE PROCESS LIMITS PUNITIVE AWARDS WHEN COMPENSATORY DAMAGES ARE SMALL.

Dr. Sadow does not dispute that this $5 million punitive award may be the largest upheld since *BMW* in any case with little or no compensatory damages. Instead, he argues that the award is permissible because this Court left open the possibility of relaxing the ratio guidepost in some small-damage cases, such as those involving particularly egregious acts. Opp. 12, 17-18.

Yet the lower courts are divided over how to use ratio or other objective indicators to ensure that punitive awards are reasonable and proportionate when compensatory damages are not substantial. Pet. 31-36. Indeed, one of the *Hebble* amicus briefs confirms that many courts are abusing this Court's "particularly egregious acts" dictum, discarding the ratio guidepost altogether by subjectively deeming a defendant's conduct egregious without applying the five reprehensibility factors identified by this Court. Brief of Product Liability Advisory Council, Inc. as Amicus Curiae in Support of Petitioners at 8-12, *Shell Oil Co. v. Hebble*, No. 10-349, 2010 WL 4641633 ("PLAC Br."); see also Pet. 32 n.2.

That is precisely what the Florida court did here. Pet. App. 44a n.30, 47a; see Pet. 13, 16. Such "fail[ure] to diligently police the 'particularly egre-

gious' exception * * * insulate[s] from due-process review precisely those cases * * * where juries are most likely to grant arbitrary and excessive awards." *Bennett v. Reynolds*, 315 S.W.3d 867, 879 (Tex. 2010).

Dr. Sadow has no answer to this split, except to suggest that this case is unique and not likely to recur. Opp. 10. He is mistaken. The cases cited in the petition (at 32-33) show that substantial punitive damages frequently accompany limited actual damages, and this Court has recognized the importance of guidance for courts reviewing the constitutionality of punitive awards in such cases. *State Farm*, 538 U.S. at 425; *BMW*, 517 U.S. at 582.

The Court has not yet reviewed such a case, however, and this petition provides an excellent vehicle for doing so. Dr. Sadow concedes that Lawnwood has preserved its due process challenge (Opp. 7-8), and the disparity here between the $5 million punitive award and $0 compensatory award vastly exceeds the 9:1 ratio that ordinarily marks the outer limit of what due process allows. *State Farm*, 538 U.S. at 425. The Court should resolve the split and provide a meaningful objective check on the size of punitive awards for cases where compensatory damages are not substantial.

II. THE FLORIDA COURT REFUSED TO APPLY THIS COURT'S GUIDEPOSTS, AND ITS HOLDINGS WILL HAVE PERVERSE EFFECTS IF ALLOWED TO STAND.

The Florida court's express refusal to follow this Court's guidepost cases alone warrants summary reversal. Yet its holdings are also spreading. Florida courts now limit "the full three-part analysis set

forth in [*State Farm* and *BMW*]" to cases involving "purely economic" harm. *James Crystal Licenses, LLC v. Infinity Radio Inc.*, 43 So. 3d 68, 76 (Fla. Ct. App. 2010).[1] If left unchecked, these decisions will stand as an invitation for States to dismantle the guideposts this Court carefully wrought to confine all punitive awards within the bounds of due process.

Dr. Sadow's brief confirms that Florida's holdings exempting large categories of cases from the guideposts are inimical to important constitutional values, including uniform and predictable treatment of similarly situated persons, free speech, and the right to trial by jury. The amicus briefs in *Hebble* also show that the Florida court's failure to analyze the five reprehensibility factors and its reliance on unsupported speculation about potential harm are important and recurring issues. These concerns should prompt this Court to make clear that exacting review of all guideposts is mandatory in all cases.

A. There can be no dispute that the Florida court refused to follow the guideposts. Merely reciting them is not enough; appellate courts must conduct an exacting, *de novo* review that applies the guideposts to the jury's punitive award. *State Farm*, 538 U.S. at 418. Although Dr. Sadow claims at the beginning of his brief that the Florida court did apply the guideposts (Opp. 1-4), he later concedes that it did not. Opp. 11, 15. He does not deny that other

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[1] Florida litigants are also using this case to argue that higher ratios are permissible under *TXO* even when compensatory damages are substantial. Appellee's Answer Brief at 22-24, *Philip Morris USA Inc. v. Hess*, No. 4D09-2666 (Fla. Ct. App. May 4, 2010), 2010 WL 2602780.

courts considering similar cases have applied the guideposts mandated by this Court. Pet. 28-31.

Reprehensibility: The Florida court declared Lawnwood's conduct reprehensible as a matter of state law simply because it intended to harm Dr. Sadow's reputation. Pet. 16. The court expressly disregarded the other four reprehensibility factors that this Court says must be considered, holding without support that they are limited to cases where the harm is merely economic. Pet. App. 44a n.30. Dr. Sadow does not defend this limitation or argue that the Florida court considered all five factors. Instead, he admits that the court "analyzed and applied the state law of Florida to measure the reprehensibility of Lawnwood's misconduct." Opp. 15. That analysis is not what this Court's precedent requires.

Other courts, including the court in *Hebble*, have similarly disregarded this Court's five-factor reprehensibility test in favor of a far more subjective reprehensibility review based on only one factor. *E.g.*, *Hebble v. Shell W. E&P, Inc.*, 238 P.3d 939, 947 (Okla. Civ. App. 2009) (intentional harm); *Trinity Evangelical Lutheran Church & School-Freistadt v. Tower Ins. Co.*, 661 N.W.2d 789, 810 (Wis. 2003) (Sykes, J., dissenting) (recidivism); see PLAC Br. 8-10; Brief of Amici Curiae Chamber of Commerce of the United States of America et al. in Support of Petitioners at 6-10, *Shell Oil Co. v. Hebble*, No. 10-349, 2010 WL 4641634 ("Chamber Br.").

This Court has held, however, that the existence of only one factor "may not be sufficient to sustain a punitive damages award." *State Farm*, 538 U.S. at 419. To ensure similar treatment for similar conduct, the Court should confirm that exacting review of all five reprehensibility factors is required.

Proportionality: The Florida court also expressly rejected the ratio or proportionality guidepost, holding that punishment "without limiting ratios" was proper and excluding actual harm from its analysis. Pet. App. 46a. Dr. Sadow concedes that the court limited the scope of the ratio guidepost to the kind of wrongdoing involved in *BMW* and *State Farm*. Opp. 11.[2] Surprisingly, he defends this limitation by arguing that the guideposts are too narrow and that courts should focus on vague considerations of fair notice, deterrence, and potential harm. Opp. 9, 11-12. To the contrary, this Court requires "[e]xacting," "*de novo*" review of the "application of [the guideposts] to the jury's award." *State Farm*, 538 U.S. at 418. While underlying state interests in punishment and deterrence may also be informative (Opp. 11), they were considered by this Court in creating the constitutional guideposts and thus provide no justification for disregarding them. *State Farm*, 538 U.S. at 416; *BMW*, 517 U.S. at 568, 574.

Dr. Sadow also offers two excuses for the Florida court's refusal to consider the proportionality of the punitive award to actual harm. Neither withstands scrutiny.

First, he suggests that some significance should be ascribed to the jury's $1.5 million award of com-

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[2] Dr. Sadow appears to suggest that the ratio guidepost was somehow waived because Lawnwood did not challenge the state-law decision that punitive damages for defamation can be awarded without actual damages. Opp. 3, 6, 8. Not so. As the petition explained (at 19), whether state law authorizes punitive damages is a different question from whether the resulting punitive award is unconstitutionally excessive.

pensatory damages for breach of contract. Opp. 4, 12. But breach of contract cannot support punitive damages. The jury was authorized to award punitive damages only for defamation, and the defamatory statements were distinct from the breaching conduct. Pet. 4-5. Damages unrelated to the conduct punished have no place in a due process review of punitive awards. *BMW*, 517 U.S. at 574 (fair notice of the "conduct that will subject him to punishment" and the "severity of the penalty" is required).

Second, Dr. Sadow asserts that the Florida court's consideration of potential harm from the defamation (Pet. App. 45a), as well as the state-law presumption of nominal damages from defamation per se (Pet. App. 50a), are enough to satisfy the guideposts. Opp. 2-3, 10-11, 13-14, 17. But presumed nominal damages of $1 cannot support a $5 million punitive award, and Dr. Sadow offered no evidence of potential harm above $1 from Lawnwood's conduct. This Court requires such evidence to uphold a punitive award based on potential harm. Pet. 26.

One of the *Hebble* amici observes that other courts have also used speculative assessments of potential harm to uphold otherwise-exorbitant ratios. PLAC Br. 13. Such unsupported speculation is the antithesis of due process because it allows each court to rely upon its own subjective, unpredictable reaction to a particular punitive award, resulting in different treatment of similar cases. Pet. 18.

Comparable penalties: Both Dr. Sadow and the Florida court studiously ignore the statutory penalty for libel chosen by Florida itself, which is only $1,000. Pet. 27-28. Such penalties should have special significance when actual damages are absent because they are the only objective guidepost available

to constrain excessive punitive awards. Here, the modest statutory penalty refutes the Florida court's premise that defamation is so egregious that it supports extraordinary punishment limited only by the defendant's ability to pay.

B. The fundamental flaw in the Florida court's opinion is not merely its failure to follow the guideposts, but also the serious consequences that flow from that failure. The court dismantled the guideposts for large categories of cases, including those involving intentional harm or any other conduct that state law excepts from a punitive damages cap. Dr. Sadow's brief vividly illustrates that the criteria the Florida court adopted in place of these guideposts create fundamental constitutional problems.

1. Dr. Sadow embraces the Florida court's holding that the State's removal of punitive damage caps gave Lawnwood fair notice of potential liability up to its ability to pay. Opp. 3, 9; Pet. App. 32a. Under this holding, any State can legislate away due process protections against excessive awards simply by giving notice that punitive damages will be unlimited. Any amount of punitives arbitrarily chosen by the jury will pass muster so long as it does not bankrupt the defendant. Such state-legislated arbitrariness is not fair notice of the severity of the penalty that may be imposed, and this Court has rightly rejected it as a substitute for exacting constitutional scrutiny of punitive awards. Pet. 19-20.

The consequences of Florida's approach will be far-reaching. The many state legislatures that capped punitive damages in certain cases as part of their tort reform efforts will be surprised to learn that they thereby nullified constitutional limits on punitive awards that were not capped. Similar con-

duct will be subject to different federal constitutional limits in each State. These results are flatly inconsistent with the uniform and predictable treatment of similarly situated persons guaranteed by the Due Process Clause.

Dr. Sadow is off base in emphasizing the Florida court's view that "reprehensibility is at its highest" in defamation cases because they have "Florida law's most severe condemnation, its highest blameworthiness, its most deserving culpability." Pet. App. 40a-41a; see Opp. 4, 15. The court's conclusion that the Constitution permits "extraordinary civil punishment without limiting ratios" for such "extraordinary wrongdoing" (Pet. App. 46a) is especially troubling because it gives no weight to the First Amendment. Courts should be more cautious when punishing speech; they should not hold that such punishment is essentially unlimited. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential * * * to inhibit the vigorous exercise of First Amendment freedoms."). At minimum, cases involving speech should bear the full weight of this Court's guidepost analysis. Cf. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 505 (1984) (appellate court must independently examine the record to ensure that unprotected speech is narrowly defined and protected speech will not be inhibited).

Here, a hospital administrator said bad things about a doctor to one other doctor. Nothing about this speech gave Lawnwood fair notice that it could suffer perhaps the largest award of punitive damages for defamation ever to survive a constitutional challenge. Pet. 34. The jury was required to find in-

tent to harm in order to award any punitive damages, so that finding does not mark this case for a more significant punitive award. Pet. 5-6, 23-24; see Chamber Br. 7-8. Nor do the administrator's comments about other physicians show heightened reprehensibility, as there was no evidence that they were slanderous or caused actual harm. Pet. 24.

2. As to proportionality, Dr. Sadow's reliance on potential harm and presumed nominal damages does not give the jury's verdict the respect it is due under the Seventh Amendment. While the jury found that Lawnwood harmed Dr. Sadow, it was instructed to consider both past and future damages and found that both were $0. Pet. App. 64a-65a, 68a. The Florida court's speculation about potential harm subverts the jury's role, especially given that it is unsupported by any evidence submitted at trial.[3] See PLAC Br. 13.

Dr. Sadow's defense of the Florida court's focus on Lawnwood's wealth rather than his actual harm (Opp. 3, 9, 16) ignores this Court's holding that wealth is a poor objective guidepost because it "provides an open-ended basis for inflating awards" and "express[ing] biases." *State Farm*, 538 U.S. at 417, 427-28. Nor can wealth be smuggled into the analysis as an aspect of deterrence because the evidence showed that a less drastic award would have achieved that goal. Pet. 25.[4]

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[3] At most, the potential harm would have been Dr. Sadow's loss of at least one referral from Dr. Pinon, who heard the defamation. Pet. 5. That harm was never quantified.

[4] Dr. Sadow faults Lawnwood for not objecting to the introduction of wealth evidence (Opp. 3), but that evidence

In sum, the Florida court flouted due process by holding that intent to harm supported extraordinary punitive damages despite the jury's award of $0 for actual harm, and that wealth was the only real limit on that punishment. These holdings resulted in a grossly excessive punitive award that application of the guideposts would have prevented.

III. APPELLATE REVIEW OF PUNITIVE AWARDS WITHOUT APPLYING THE GUIDEPOSTS MANDATED BY THIS COURT DENIES PROCEDURAL DUE PROCESS.

Having previously recognized substantive constitutional limits on the size of punitive awards, this Court held that a State's inability to review the awards for excessiveness raised "a presumption that its procedures violate the Due Process Clause." *Oberg*, 512 U.S. at 429-30. Later, after establishing the three due process guideposts, this Court held that they must be applied in a thorough, independent, *de novo* appellate review to assure "the uniform general treatment of similarly situated persons that is the essence of law itself." *Cooper Indus.*, 532 U.S. at 436, 441. Now that the Court has established "specific procedures [and] substantive criteria essential to satisfy due process," there should be no disagreement that a court's failure or refusal to apply them is a procedural violation of the Due Process Clause. *Oberg*, 512 U.S. at 437-38 (Ginsburg, J., dissenting); *id.* at 436 (Scalia, J., concurring); see also *Cooper In-*

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was admissible under state law. Lawnwood's point is that this evidence, even if lawfully admitted and used at trial, should not play a role in the constitutional analysis. *State Farm*, 538 U.S. at 427-28.

dus., 532 U.S. at 443 (Thomas, J., concurring); Pet. 21.

By legislatively proclaiming the reprehensibility of intentional harm, contorting proportionality to measure only the defendant's wealth, and simply ignoring comparable penalties, Florida has done more than "classify arbitrariness as a virtue." *State Farm*, 538 U.S. at 417-18. It has ignored the procedure for appellate review this Court prescribed to ensure that state awards of punitive damages do not deny due process.

CONCLUSION

The Court should summarily reverse the judgment of the Florida Court of Appeal or, alternatively, grant certiorari and set this case for plenary review.

Respectfully submitted.

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